

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1213 OF 2005

MR. MOHAN GIRDHAR SINGH

R/O. MODI STREET,

BAZAR GATE, MAFIA HOUSE,

1ST FLOOR, MUMBAI.

..APPELLANT

V/S

THE STATE OF MAHARASHTRA

THROUGH SR. INSPECTOR OF

POLICE, MARINE DRIVE

POLICE STATION.

..RESPONDENTS

MR. RAJENDRA SORANKAR, ADVOCATE FOR APPELLANT.

MS. D.H. MHATRE, APP FOR STATE.

CORAM : J.H. BHATIA, J.

DATE : 14TH JUNE, 2007.

JUDGMENT

1. The accused/appellant has preferred this appeal against his conviction and sentence for offence punishable under section 450, 392, 394 and 397 of IPC passed by the learned Sessions Judge, Greater Bombay, in Sessions Case No. 811 of 2004. He was sentenced to undergo R.I. for five years and to pay

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a fine of Rs. 500/- for offence punishable under section 450 of IPC, to R.I. for seven years and fine of Rs. 1000/- for the offence punishable under section 392 of IPC, to R.I. for five years and a fine of Rs. 500/- for the offence punishable under section 394 of IPC and he was also separately convicted and sentenced to undergo R.I. for seven years for the offence punishable under section 397 of IPC.

2. Prosecution case in brief is that P.W. 1 Mustafa Razak Khan owned two shops in Hilton Towers previously known as Oberoi Hotel at Nariman Point, Mumbai. On the mezzanine floor he used to run the business in the name of Shalimar Handicrafts. Similarly on the 2nd floor he used to own shop called Seming Precress Stone. On 17-7-2004 at 2.00 p.m. he was present at the shop at the mezzanine floor and was praying Namaz. At that time a boy aged about 20 years i.e. the present accused suddenly entered in his shop and slided the curtain on the door. After that the accused threatened P.W. 1 saying that " Paisa Do Ya Mal Do". At that time he also took out a koyta or sickle from black

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coloured rexin bag in his hand. He threatened to kill if the amount is not paid. After giving threats he himself lifted 2 ruby mala and 2 moti mala and put them in black coloured bag. After that he told P.W.1 Mustafa to give money or he would kill him. Due to fear P.W.1 Mustafa opened the drawer used as cash box but there were nothing. The accused continued to search. At that stage P.W.1 Mustafa told him "abhi bus ho gaya". Due to this the accused got annoyed and assaulted P.W.1 Mustafa from the pointed side of the sickle above the left eye and caused bleeding injury. In that incident the accused caused injury on the forehead of P.W.1 Mustafa with sharp cutting weapon like sickle and had also taken away muddemal worth Rs. 3000/-. P.W.1 Mustafa shouted loudly and then accused ran away. P.W.1 Mustafa came out from the shop and shouted "chor chor pakda pakda". At that time people from the neighbouring shops came there. P.W. 2 Vishwanath Shinde nabbed the accused alongwith the bag and took him to P.W.1 Mustafa. After that the police came to the spot and recorded the spot panchnama. accused caused injury on the forehead of

P.W.1 Mustafa with sharp cutting weapon of sickle and has also taken away muddemal worth Rs. 3000/-.

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3. According to the prosecution after the incident, P.W.1 Mustafa immediately rushed to the Bombay Hospital for getting treatment for the injury suffered by him. Doctor on duty sutured the injury and thereafter he came to the spot between 3.00 p.m. to 3.30 p.m. The spot panchnama was prepared by the police and during the spot panchnama, the koyta or sickle, which was used as weapon of offence by the accused, was seized lying on the spot of the incident. After the panchnama accused was taken to the Police Station Marine Drive, where in presence of the panch witnesses the black coloured rexin bag in his possession was seized. From that bag stolen property i.e. two ruby mala and 2 moti mala were recovered. All the property was seized under seizure panchnama at the police station between 3.30 to 4.00 p.m. After that at about 4.00 p.m. FIR of the P.W. 1 Mustafa was reduced to writing and crime No. 173/2004 was registered under section 394 and 397 of IPC. After investigation the charge sheet was filed against the accused and the case was committed to the Court of Sessions.

4. The Sessions Court framed charge vide Exhibit -

2 against the accused for the offences punishable under section 450, 390, 394 and 397 IPC. Accused pleaded not guilty to the charges. According to him

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he was an employee of Akashganga Courier. In Hilton Tower, there were customers of Akashganga Couriers. The accused and his father were also their customers and they used to give work to Akashganga couriers. However, for sometime they had stopped giving work to Akashganga Couriers. At the relevant time the accused had been to the shop of P.W. 1 Mustafa with black coloured rexin bag containing some parcels as courier only to make a request to him to continue to give work to Akashganga Couriers. However, P.W. 1 Mustafa got annoyed about the service provided by Akashganga Courier and it resulted into exchange of hot words. According to the accused he had not committed any offence and he was falsely implicated. On behalf of the prosecution in all 7 witnesses were examined. Accused also examined defence witness Devilal Hissaria, Manager of Akashganga Courier in support of the claim. However after hearing the parties the learned Sessions Judge convicted and sentenced the accused for all the charges.

5. Heard learned counsel for the parties. Perused the record and proceedings of the trial court. Out of the seven witnesses examined by the prosecution P.W. 1 Mustafa is the only witness of whole of

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the incident. He and his father were running two shops, one at the mezzanine floor and another at the second floor of Oberoi Hotel/Hilton Towers Building. His evidence reveals that on 17-7-2004 from 10 a.m. onwards he was attending the shop at Mezzanine floor. At about 2 p.m. he was praying Namaz in his shop. According to him when he was praying Namaz, the accused came there and slided the curtain on the door and took out a koyta and threatened him saying "paisa do ya maal do". After that he removed 2 ruby mala and 2 moti mala from the showcase and put them in the black coloured bag with him. After that he opened the drawer of the showcase but did not find any cash. As the P.W. 1 told him "Ab Bus ho gaya", the accused gave a knife blow on his forehead causing bleeding injury to P.W. 1. Due to the assault Mustafa shouted and the accused tried to ran away. He chased him. While running away the accused was obstructed by a stool in the shop and thereupon koyta or sickle in his hand fell down in

the shop. P.W. 1 Mustafa shouted "chor chor" and at a short distance the accused was nabbed by P.W. 2 Vishwas Shinde who was working as sweeper in the said building.

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6. P.W. 2 Vishwas Shinde deposed that at about 2 or 2.30 p.m. he was putting some garbage in the dustbin. At that time he heard the shouts "chor chor pakdo pakdo" and also saw that one boy was running from the stair case and some owners of the shops were also chasing him. P.W. 2 Vishwas caught hold of him. Accused gave him a blow with a bag, however accused slipped and therefore P.W. 2 Vishwas nabbed him. 2/3 other persons also caught hold of the accused and handed him over in the custody of the P.W. 1 Mustafa. P.W. 3 Rakesh Seth, who was also having a shop in the mezzanine floor, also supported the prosecution. According to him at about 2.15 or 2.30 p.m. after taking lunch he was strolling in the passasge outside his shop. At that time one boy carrying a bag in his hand came out from the Shalimar shop and P.W. 1 Mustafa shouted "chor hai chor hai pakdo". P.W. 2 Vishwas Shinde and one Sulekh tried to stop him. However

that boy went towards Art Walk Gallery, where he slipped on the granite floor and P.W. 2 Vishwas Shinde caught the boy, who is identified as accused and he was taken back to Shalimar shop. The accused

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was later on handed over to the police.

7. P.W. 5 Dr. Sagar Sakale was the C.M.O. at Bombay Hospital. As per his evidence on 17-7-2004 at about 2.30 p.m. P.W. 1 Mustafa Khan had come to the hospital with injury. He sutured the wound and also issued a medical certificate Exh. 14. The casualty case papers are at Exh. 15.

8. As per the evidence of P.W. 7 PSI Ramdas Kudale, he was attached to Marine Drive Police Station and was on duty as S.H.O. and he got a telephonic message at about 2 p.m. that a robbery had taken place at Oberoi Hotel and therefore he immediately rushed to the spot alongwith his staff. His evidence reveals that when he went to the Shalimar shop the accused was detained in the said shop and in presence of P.W. 1 Mustafa and 2 panch

witnesses, including P.W. 4 Mohd. Hussain, he recorded the spot panchnama Ex. 13. The sickle Article 2 was also seized under the spot panchnama. Accused was taken in custody. P.W. 4 Mohd. Hussain supported the prosecution case.

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9. The evidence of P.W. 7 PSI Ramdas Kudale further shows that he took the accused to police station and called two panch witnesses. As per the evidence of P.W. 6 Sundersingh Pundir, the panch witness, there was black coloured bag on the shoulder of the accused. The accused opened the zip of the said bag in the presence of the panchas and from the said bag two moti malas and two multi colour ruby malas were found. All these articles were seized by the police under panchnama Ex. 17 at the police station.

10. In view of this, the learned counsel for the accused/appellant vehemently attacked the prosecution evidence and contended that the prosecution evidence suffers from several inconsistencies, discrepancies and contradictions.

He also contended that if the whole evidence is properly scrutinised it appears that the story of robbery and assault with a knife or koyta was cooked up just to implicate the accused falsely in a serious offence of robbery.

11. It will be necessary to scrutinise the said evidence minutely and find out whether the evidence

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is trustworthy or not. First of all it should be noted that FIR Ex. 8, which was recorded at the police station Marine Drive at 4 p.m., reveals that the accused had threatened and had assaulted him with said koyta or sickle. However in his evidence P.W. 1 Mustafa has deposed that accused was having a koyta or sickle and he threatened him with the same. He further deposed that the accused had assaulted and injured him with a knife. However the evidence of P.W. 5 Dr. Sagar Sakle reveals that at about 2.30 p.m. when the P.W. 1 Mustafa reached the Bombay Hospital for treatment of his injury on his hand, he had stated that the injury was caused due to glass. Accordingly the history of injury was taken on the casualty papers Exh. 15 and it is also mentioned in the medical certificate Exh. 14. It is not the prosecution case that the medical officer

had wrongly noted this history. P.W. 1 Mustafa tried to explain that in the Bombay Hospital he had given incorrect history of the injury to avoid hassles of police and panchnama. It shows that he had no intention to approach the police about the robbery because he himself did not want to face the police enquiry. If serious offence of the robbery was committed and the injury was caused to him with some weapon there was no reason to avoid police

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or police enquiry. It is material to point out that about the actual incident except P.W. 1 Mustafa there is no other witness and about the injury suffered by him he has given 3 different versions. First in time, immediately after the alleged incident he stated before the casualty officer at the hospital that he had suffered injury with a glass. FIR Exh. 8, which was recorded after 4 p.m. and after much of the investigation was completed, he had alleged that the accused had assaulted and injured him with koyta. However in his evidence before the court he deposed that accused had injured him with a knife. Knife and koyta or sickle are totally different weapons. He is also aware about the difference between the knife and koyta or

sickle.

12. As per the evidence of the P.W. 1 Mustafa, he returned to his shop at about 4 or 4.30 p.m. from the hospital and then went to the police station. However as per the evidence of PSI Kudale as well as the contents of the spot panchnama Exh.13, the spot panchnama was recorded at Shalimar Shop between 3 and 3.30 p.m. and that time Mustafa was present at the shop. The second panchnama Ex.17 about the seizure of the bag and the stolen property i.e.

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ruby mala and moti mala was prepared at police station between 3.30 to 4.00 p.m. At that time also P.W. 1 Mustafa was present at the police station. It appears that statement of the witnesses were recorded even before recording of the FIR because P.W. 3 Rakesh Seth admits that his statement was recorded by the police at Marine Line Police Station at 3.50 p.m. It is interesting to note that in the spot panchnama Ex. 13 as well as the seizure panchnama Ex. 17 there is a clear mention that these two panchnamas were made in crime No. 173/2004 under section 394 and 397 of IPC registered at Marine Drive Police Station. The FIR Exhibit 8 clearly reveals that this report was received at the

police station at 4 p.m. and then crime No. 173 of 2004 was registered. P.W. 7 PSI Ramdas Kudale also admits that the offence was actually registered at 4 p.m. He also admits that both the panchnamas were recorded before recording of the FIR and registration of the offence. It is surprising that when the FIR itself was not recorded and the offence was not registered till 4 p.m., how the crime number and sections 394 and 397 could be noted down in the spot panchnama and the seizure panchnama. PSI Ramdas Kudale tried to explain that before recording

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the spot panchnama he got the crime number on telephone and noted down the same in the spot panchnama. For a moment even if it is believed that as the police party reached the spot immediately and it was necessary to record the spot panchnama and he also obtained crime number on telephone, it is not clear why the seizure panchnama was recorded before recording of the FIR. As per the evidence of Mustafa, he came back from the hospital at 4.30 p.m. and he immediately went to the police station, which is at a short distance from the spot of incident and his FIR came to be recorded. As there was no witness except P.W. 1 Mustafa himself about the

alleged robbery and assault, the offence under section 394 and 397 IPC, could not have been registered unless his own report was recorded by the police. If it is so, at 3 p.m. or 3.30 p.m. when the panchnamas were recorded, police could not have noted particular crime number and that too under section 394 and 397 of IPC.

13. The next important aspect is about the recovery of the stolen property. As stated earlier, as per

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the prosecution story, stolen property, i.e., ruby mala and moti mala were recovered from black coloured bag which was in possession of the accused under panchnama Exhibit 17 at the police station. However the P.W. 1 Mustafa deposed that the spot panchnama was recorded in his presence and koyta was seized. He deposed that police personnel also seized ruby mala and moti mala robbed by the accused from his shop under the said spot panchnama. It shows that this stolen property was seized by the police in the shop and not at the police station.

It is interesting to note that initially in the examination-in-chief, P.W. 7 PSI Ramdas Kudale also deposed that two ruby mala and moti mala were seized under spot panchnama. It appears that due to this admission, learned Addl. Public Prosecutor conducting the case got disturbed and orally requested the court to keep back the matter for some time and accordingly recording of the evidence was postponed for sometime. After some time recording of evidence was resumed and PSI Ramdas Kudale deposed that 2 ruby mala and moti mala were not

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seized under the spot panchnama and they were seized at the police station. From this it appears that initially PSI Ramdas clearly admitted that the muddemal property were recovered at the spot of the incident as deposed by P.W. 1 Mustafa himself. However as this evidence was contrary to the contents of the seizure panchnama Ex. 17, Learned APP requested the court to postpone the recording of the evidence for sometime and then the PSI Ramdas Kudale deposed according to the prosecution story. This is material discrepancy in the prosecution case

and in the oral admission made by P.W. 1 Mustafa and PSI Ramdas. If for a moment evidence of Mustafa is believed that moti mala and ruby mala were seized under the spot panchnama at his shop, the seizure panchnama Ex. 17 which was allegedly recorded at the police station, becomes suspicious and doubtful documents. If the property was already recovered and seized at the spot of the incident, it could not have been seized at the police station during the search of the bag in custody of the accused. This creates serious doubt about the recovery of the stolen property from the accused.

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14. The record reveals that the learned defence counsel had brought on record several omissions and improvements in the oral evidence of P.W. 1 Mustafa, P.W. 2 Vishwas Shinde and P.W. 3 Rakesh Seth. However I do not deem it necessary to discuss each of them. Taking into consideration the circumstances stated above it is clear that the offence was registered at or after 4 p.m. after recording the FIR of Mustafa. However much before that 2 panchnamas were also recorded indicating the

registration of particular crime number under section 394 and 397 of IPC for which no report was lodged with the police till then. There is serious doubt about the recovery of muddemal property from the accused at the police station. The evidence of Mustafa himself is not consistent as he has given three different stories about the injury caused to him. It is material to note that as per P.W. 5 Dr. Sagar the injury could be caused by a glass or sharp cutting weapon. In such circumstances the possibility cannot be ruled out that the timings of the spot panchnama, seizure panchnama and FIR and whole of the record might have been manipulated

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or prepared to show that the accused had committed serious offence of robbery by sharp weapon and he had also caused injury in that attempt. As stated above except P.W. 1 Mustafa there is no eye witness of the actual incident of robbery. Evidence of other witnesses could be used for the purpose of corroboration to his testimony but taking into consideration all the circumstances noted above the evidence does not inspire confidence and does not

appear to be trustworthy and reliable. Taking into consideration all these circumstances, whatever incident might have taken place, it may be held that the prosecution has failed to prove beyond reasonable doubt that the accused had committed robbery and that he was armed with sharp and cutting weapon at the time of commission of robbery and he had also caused injury with such a sharp weapon in an attempt to commit robbery.

15. The accused examined D.W. 1 Devilal Hissaria, Manager with Akashganga Courier, in support of his plea that he had been to the shop of Mustafa in connection with the business of courier. His evidence appears to have been rejected by the trial court merely because he did not produce the record

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to show that the accused was in fact working with Akashganga Courier. I find it not necessary to minutely consider that evidence, particularly when that the prosecution evidence itself does not appear to be consistent, cogent and trustworthy and reliable. In view of the evidence on record the accused could not be convicted for any of the charges.

16. Before concluding it may be noted that the learned trial court convicted the accused and sentenced him for the offence under section 392 and 397 IPC separately. It is well settled position of law that section 397 of IPC does not create any substantive offence. Sec. 397 merely regulates the punishment provided for the offence of robbery or dacoity by fixing the minimum term of the imprisonment of 7 years, if the offender while committing robbery or dacoity used a deadly weapon or caused grievous hurt or attempted to cause grievous hurt or death. When the accused is charged for the offence of robbery and it is alleged that he has also used deadly weapon charge should be framed under section 392 read with sec. 397 and not under section 392 and 397 IPC independently. If the guilt of the accused is proved he is to be convicted and

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sentenced u/s. 392 r/w 397. He cannot be convicted and sentenced separately under s. 392 as well as s. 397 IPC. This is supported by an authority of this court in Philip Bhimsent Aind v. The State of Maharashtra 1995 Criminal Law Journal 1694. The learned trial court did not consider the legal position correctly and convicted and sentenced the

accused under section 392 as well as sec. 397 IPC.
This was not correct.

17. Taking into consideration the evidence discussed above, the impugned order of conviction cannot be sustained and is liable to be set aside.

The Appeal is allowed.

The Judgement and Order of conviction and sentence are hereby set aside.

The accused is acquitted of all the charges.

He be set at liberty forthwith if not required in any other case.

(J.H. BHATIA, J.)